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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **BOBBY BERT THRASHER, JR.,** **Defendant and Appellant.**	**A102469** **(Humboldt County Super. Ct. No. CR026164S)**

Bobby Bert Thrasher Jr. (Thrasher), appeals from a judgment of conviction entered after he pled guilty to possession of heroin for sale (Health & Saf. Code, § 11351). He contends: (1) the magistrate erred in denying his motion to suppress; (2) he was denied effective assistance of counsel when his attorney did not renew the suppression motion in the trial court to preserve it for appeal; and (3) the trial court erred in imposing a parole revocation fine pursuant to Penal Code section 1202.45. We agree that the parole revocation fine was imposed in error and direct that the judgment be modified and a new abstract of judgment be issued consistent with this opinion. As so modified, the judgment is otherwise affirmed.

I. FACTS AND PROCEDURAL HISTORY

On December 16, 2002, a criminal complaint filed in Humboldt County Superior Court charged Thrasher with felony possession of heroin for sale (Health & Saf. Code, § 11351), misdemeanor possession of an opium pipe or other device for smoking a controlled substance (Health & Saf. Code, § 11364), and violation of Health and Safety Code section 11366.5, subdivision (a).

A week later, Thrasher filed a motion to suppress evidence pursuant to Penal Code section 1538.5.[1] He contended that sheriff deputies' warrantless entry and search of a motel room was unlawful, such that the evidence seized as a result of the search should be suppressed.[2] The suppression motion was heard on December 27, 2002, at the same time as the preliminary hearing.

A. PRELIMINARY HEARING/HEARING ON MOTION TO SUPPRESS

The evidence adduced at the hearing included the following.

At about 5:30 p.m. on December 12, 2002, Humboldt County Deputy Sheriff Jason Daniels was investigating a burglary that had just occurred. The suspect had been spotted in an older blue car with old blue California license plates. At approximately 8:15 p.m., Deputy Daniels observed a blue Buick, matching the description of the suspect's vehicle, parked at a Motel 6. The deputy learned from his dispatcher that the registered owner of the vehicle was a William Einman. From the motel manager he learned that the vehicle was listed on the motel registration card for Louis Person, who was staying in room 128.

A records check indicated Person had two outstanding arrest warrants and was subject to a search and seizure clause as a condition of his probation. Deputy Daniels and two other deputies went to room 128 and knocked on the door, in order to serve the warrants, question Person about the burglary, and possibly conduct a probation search of the room. Although the lights were on and Daniels could hear someone in the room, no one answered. One of the officers then went to the front office of the motel and had a call placed to room 128, which instructed Daniels to open the door on the pretext of a water leak in the room. Thrasher eventually opened the door. Deputy Daniels asked if he was Person, and Thrasher responded, "No. My name is Bob." He said Person was not there at the time and had gone to Eureka.

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1 Unless otherwise indicated, all further section references are to the Penal Code.

Deputy Daniels asked Thrasher for identification. Thrasher stepped back into the room, leaving the door "[p]retty much open all the way," and sat on a bed. Because he could not see the bed from the threshold of the door, Deputy Daniels entered the room for officer safety purposes, unsure what Thrasher was going to do or whether he had a gun. The deputy noticed in plain view a silver spoon on a blue box on the bed next to the bed on which Thrasher was sitting. The spoon was blackened and had a black tar-like substance on it (which subsequently tested positive for a usable amount of heroin). Based on his training and experience, the officer believed the substance on the spoon was "consistent with heroin." When Deputy Daniels inquired about the spoon, Thrasher responded that it belonged to Person. Thrasher said he had last used drugs about two days earlier.

Daniels asked Thrasher about the blue vehicle parked outside. He replied it belonged to his cousin, William Einman, who had given it to him. Thrasher denied being in the area of the burglary earlier in the day.

Daniels noticed that Thrasher appeared nervous, was unable to sit still, and kept putting his hand in his pants pocket. He asked Thrasher to keep his hands out of his pockets, for officer safety purposes.

Based on the suspected heroin on the spoon, Daniels arrested Thrasher for possession of narcotics. During an ensuing pat-down search, Deputy Daniels felt and removed from Thrasher's left front pants pocket a "[p]lastic baggy with a hard black substance inside the baggy." The black substance appeared consistent with tar heroin. The baggie contained several smaller baggies, which held smaller amounts of suspected tar heroin. The black substance was subsequently tested and determined to be tar heroin in an amount that indicated, according to expert witness testimony, that it was possessed for the purpose of sale.

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2 The written motion did not specifically identify the heroin found on his person as part of the evidence to be suppressed. At the hearing, defense counsel amended the motion, without objection, to cover all items seized as a result of the warrantless search.

The officers searched the motel room and found: a paper bag on the bed containing 53 hypodermic needles, syringes, and pill bottles containing marijuana; a blue backpack containing hypodermic syringe kits, bent metal spoons, a glass smoking pipe, alcohol wipes, sterile water containers, elastic bands, and a metal box containing marijuana; an eyeglass case on the nightstand with other hypodermic needles and syringes, one of which was full of a black tar-like substance consistent with heroin; under the mattress another hypodermic needle and syringe full of black tar-like substance consistent with heroin; and on the dresser a brown paper bag containing a plastic baggie with suspected marijuana, a set of scales, and six hypodermic needles and syringes. All of the foregoing items were seized. Thrasher consented to a search of the blue Buick, but nothing of evidentiary value was recovered.

At the end of the December 27 hearing, Thrasher's motion to suppress was denied, and he was held to answer on the charged offenses.

B. PLEA AND SENTENCE

Thrasher was then charged by information with felony possession of heroin for sale (Health & Saf. Code, § 11351), misdemeanor possession of an opium pipe or other device for smoking a controlled substance (Health & Saf. Code, § 11364), and misdemeanor possession of a hypodermic needle or syringe (Bus. & Prof. Code, § 4140). Thrasher initially pled not guilty, but later withdrew his plea as to count one (possession of heroin for sale) and entered a plea of guilty as to that count, pursuant to a negotiated plea agreement. The remaining counts were dismissed on the People's motion.

Imposition of sentence was suspended and the trial court placed Thrasher on four years of supervised probation, subject to the condition that he serve a term of 365 days in jail, with one day suspended. The court ordered Thrasher to pay a restitution fine of $600 pursuant to section 1202.4, subdivision (b), and imposed and stayed a $600 parole revocation fine pursuant to section 1202.45.

This appeal followed.

II. DISCUSSION

As mentioned, Thrasher contends: (1) the magistrate erred in denying his motion to suppress; (2) he was denied effective assistance of counsel when his attorney did not renew the suppression motion to preserve it for appeal; and (3) the trial court erred in imposing a parole revocation fine pursuant to section 1202.45.

A. JURISDICTION

Because Thrasher appeals after entering a guilty plea, we must first consider whether we have jurisdiction to hear his appeal.

A defendant generally may not appeal from a judgment of conviction obtained upon a plea of guilty, unless he filed with the trial court a written statement showing reasonable grounds for the appeal and the trial court executed and filed a certificate of probable cause. (§ 1237.5.) A certificate of probable cause is not required if the appeal is based solely on grounds that either (1) occurred after entry of the plea, and which do not challenge the plea's validity, or (2) involve a search or seizure, the validity of which was contested pursuant to section 1538.5. (*People v. Panizzon* (1996) 13 Cal.4th 68, 74; former Cal. Rules of Court, rule 31(d)[3]; see § 1538.5, subd. (m).) Where an appellant seeks review of matters for which a certificate of probable cause was required, in addition to matters falling within the exceptions to the requirement, we need consider only those that are subject to the exceptions. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1096 (*Mendez*).)

Thrasher's challenge to the imposition of the parole revocation fine as part of his sentence falls within the first exception. The other issues he raises on appeal, however, are not subject to our review.

1. Denial of Motion to Suppress

Thrasher's attack on the denial of his motion to suppress purportedly falls within the second exception, resting on section 1538.5, subdivision (m). Section 1538.5, subdivision (m), entitles a defendant to appeal from a judgment following a guilty plea if

he made a motion to suppress evidence "at some stage of the proceedings." However, the phrase, "at some stage of the proceedings" refers to proceedings in the superior court, rather than a municipal or justice court. (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896 (*Lilienthal*).) Thus, our Supreme Court has held, a defendant must seek superior court review of a magistrate's suppression ruling "to preserve the point for review on appeal, for it would be wholly inappropriate to reverse a superior court's judgment for error it did not commit and that was never called to its attention." (*Ibid*.)

In the matter before us, Thrasher's suppression motion was heard by a magistrate at the preliminary hearing. After the motion was denied, the information was filed in superior court, he pled guilty, and he was sentenced. He did not renew in the trial court either his suppression motion or any other motion raising the same contentions. Accordingly, Thrasher waived his right to appellate review of the denial of his suppression motion.

Thrasher maintains that *Lilienthal* should no longer be followed in light of the unification of municipal and superior courts. We are mindful, of course, of our obligation to follow the precedent of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Moreover, other California appellate courts have interpreted *Lilienthal* to require that the suppression motion be renewed before a superior court judge other than the preliminary hearing magistrate, even after trial court unification. (See, e.g., *People v. Hinds* (2003) 108 Cal.App.4th 897 (*Hinds*); *People v. Hoffman* (2001) 88 Cal.App.4th 1, 3 [*Lilienthal* applies after trial court unification because Cal. Const., art. VI, § 23(c), which created the unified court system, specifically provides for trial court review of preliminary hearing suppression motions]; *People v. Hart* (1999) 74 Cal.App.4th 479, 483-484 [*Lilienthal* rule applies after trial court unification, in light of distinct roles assigned to the preliminary hearing magistrate and the trial court] (*Hart*).)

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3 California Rules of Court, rule 31(d) was amended effective January 1, 2004.

Thrasher also contends *Lilienthal* does not apply because his suppression motion was heard in the Humboldt County Superior Court, before a magistrate who was designated as a superior court judge. The distinction underlying *Lilienthal*, however, lies not in the physical location of the courtroom or the title of the decision-maker, but in the nature of the decision-maker. A magistrate's power is limited (§ 991), while the trial judge has authority to review the magistrate's finding of probable cause and reverse it. (§ 995; *Hart*, *supra*, 74 Cal.App.4th at p. 485.) Indeed, in *Hinds*, *supra*, 108 Cal.App.4th 897, the court applied *Lilienthal* even though the magistrate who denied the suppression motion and the judge who accepted the defendant's guilty plea and imposed sentence were both superior court judges. (*Id*. at p. 900, fn. 1.)

The decision in *People v. Callahan* (1997) 54 Cal.App.4th 1419 (*Callahan*) is not to the contrary. There, the court ruled that the denial of a suppression motion in municipal court, without renewal before the superior court, could be reviewed on appeal. But contrary to Thrasher's characterization, the court in *Callahan* did *not* rule that the advent of trial court unification affected the application of *Lilienthal*. (*Callahan, supra,* at p. 1423, fn. 2.) Instead, it affirmed the right to review the municipal court's denial of the suppression motion where the motion to suppress, the guilty plea, and the imposition of sentence *all occurred in the municipal court*. (*Id*. at pp. 1426-1427.) Obviously, that was not the procedure in the matter before us.

Thrasher has waived the right to appeal the denial of his motion to suppress.

2. Ineffective Assistance of Counsel

Thrasher further contends that, if his right to challenge the denial of the suppression motion was waived by his trial counsel's failure to renew it, he was denied effective assistance of counsel. An appeal raising a claim of ineffective assistance of counsel prior to the entry of a guilty plea is inoperative, however, without a certificate of probable cause. (*People v. Stubbs* (1998) 61 Cal.App.4th 243, 244-245; *Mendez*, *supra*, 19 Cal.4th at p. 1100.) Because the failure of Thrasher's counsel to renew the

suppression motion occurred before Thrasher's guilty plea, the issue may not be heard on direct appeal.[4]

B. MOTION TO SUPPRESS

In light of the foregoing, we need not decide the merits of Thrasher's claim that the suppression motion was improperly denied or that he received ineffective assistance of counsel. Nevertheless, to confirm the lack of any prejudice in failing to obtain review of the magistrate's decision, we briefly address Thrasher's arguments.

Thrasher pled guilty to the charge of possession of heroin for sale, which was premised on the heroin found on Thrasher's person. On the record before us, we conclude that the search of Thrasher's person was lawful: (1) Deputy Daniels was entitled to search room 128 without a warrant, because there was substantial evidence the room was registered to Person, who had consented to warrantless searches as a condition of his probation (*People v. Woods* (1999) 21 Cal.4th 668, 674 (*Woods*)); (2) this authorization justified Deputy Daniels presence in the room; (3) once inside the room, Deputy Daniels observed the blackened spoon with apparent heroin in plain view; (4) the proximity of the spoon to Thrasher, Thrasher's nervous demeanor, and Thrasher's admission that he had used drugs within the last couple of days gave Deputy Daniels probable cause to arrest him for possession of narcotics; and (5) the search of Thrasher's person was lawful as a search incident to arrest.

We address Thrasher's arguments to the contrary, in turn.

1. Warrantless Entry into the Room on Basis of Search Condition

A probationer may "consent in advance to warrantless searches in exchange for the opportunity to avoid service of a state prison term." (*Woods, supra,* 21 Cal.4th at p. 674.) Accordingly, Thrasher does not debate that a limited search of room 128 would

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[4] We have also denied appellant's petition for habeas corpus (A104722) on its merits, by a separate order filed on this date. Appellant's habeas petition seeks relief based on his claim of ineffective assistance of counsel. Habeas relief is unavailable as to matters that could have been raised on a direct appeal, but for the defendant's failure to obtain a certificate of probable cause. (*In re Brown* (1973) 9 Cal.3d 679, 682-683.)

be justified if it had been rented to probationer Person. Rather, he claims there was insufficient evidence to establish that the room was, in fact, rented to Person.

Substantial evidence supports the magistrate's finding in this regard. The officers knew the room was rented to a Louis Person, and they knew that someone with the same *unusual* name had a search clause. Although Daniels admitted he was "not 100 percent sure" that the Person registered in room 128 was the same Person who had the search clause, and did nothing to investigate the matter before entering the room, there was a substantial basis for Daniels to reasonably believe, even if not conclusively, that the room 128 occupant had a search condition. Furthermore, there was substantial evidence the resident of room 128 *did* have a search condition, whether or not the officer could have done more to ascertain whether he had one. The Louis Person who was subject to the search clause had two outstanding arrest warrants for possession of a hypodermic needle and drug paraphernalia, and it turned out there were hypodermic needles and drug paraphernalia in room 128. We also note that Thrasher told the authorities that the blackened spoon belonged to the Louis Person who occupied room 128.

By virtue of the search condition of Person's probation, Person had consented in advance to the warrantless search of his person and premises. It was not unlawful for Deputy Daniels to enter room 128 for that purpose.

2. Warrantless Entry into the Room by Way of Police Ruse

Thrasher was persuaded to open the door to room 128 after a deputy had a telephone call placed to the room, advising Thrasher to answer the door because there was a water leak in his room. For this reason, Thrasher contends the evidence obtained as a result of the ensuing search should have been suppressed. Again, we disagree.

It is true that, if officers do not have reasonable cause to enter a residence before they convince the resident to open the door by subterfuge, they cannot justify the ensuing search by what they observed when the door was opened. (*People v. Reeves* (1964) 61 Cal.2d 268, 271, 273.) But here, as a result of Person's search condition, the officers *could* lawfully enter and search room 128 in the first place, and did not rely on what they

saw inside the room to justify their entrance. The fact that they used a ploy to convince Thrasher to open the door is therefore immaterial to the legality of the search.

3. Search of Thrasher's Pockets as Incident to Arrest

Thrasher claims that, even if the entry into room 128 was lawful based on Person's search clause, the officers could lawfully search only those parts of the room that they reasonably believed were under Person's control, which would not justify the search of Thrasher's person (revealing the plastic baggies containing heroin). (*Woods*, *supra*, 21 Cal.4th at p. 682.) Recognizing that Deputy Daniels testified he saw the blackened spoon in plain view, placed Thrasher under arrest for possession of the spoon, and then patted him down, Thrasher contends the search of Thrasher's person could not be justified as being incident to a lawful arrest either, because the arrest was not lawful.

A warrantless arrest is constitutional if the officers at the time had probable cause to make it. (*Beck v. Ohio* (1964) 379 U.S. 89, 91.) Probable cause is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man to believe that the party is guilty of the offense of which he is charged.

Daniels arrested Thrasher for possession of narcotics because, on the bed next to the one on which Thrasher was sitting, there was a blackened spoon with a black tar-like substance on it. Daniels's experience and training led him to believe the substance was heroin. Although the spoon was not on the bed Thrasher was sitting on, and Thrasher claimed the spoon belonged to Person, the two beds were only a couple of feet apart. As we have mentioned, Thrasher also acknowledged using drugs about two days earlier, and he was nervous and unable to sit still while Daniels was questioning him. The totality of circumstances supports the conclusion that Daniels had probable cause to arrest Thrasher for possession of narcotics.

4. Search of Thrasher's Pockets as Pat-down Search for Officer Safety

Thrasher contends that the search of Thrasher's person could not be justified as a pat-down search for officer safety, pursuant to *Terry v. Ohio* (1968) 392 U.S. 1, 21, 23-24, 27 (*Terry*). To justify such a search, the officer must be able to identify "specific and articulable facts which, taken together with rational inferences from those facts,

reasonably warrant" a suspicion that the suspect is armed and dangerous. (*Id*. at p. 21.) Because the search of Thrasher's person was conducted incident to his lawful arrest, we need not consider the application of *Terry*.

In the final analysis, Thrasher has not established error in the denial of his suppression motion. Even if we were to consider his other arguments on appeal, neither his challenge to the denial of the motion nor his claim of ineffective assistance of counsel would afford him relief.

C. PAROLE REVOCATION FINE

In the absence of compelling and extraordinary circumstances, the court must impose a restitution fine as to any defendant convicted of a felony. (§ 1202.4, subd. (b).) The sentencing court must also impose and stay a parole revocation fine, *if* the defendant receives a sentence that includes a period of parole. (§ 1202.45.) Thrasher argues that the trial court erred in imposing a $600 parole revocation fine under section 1202.45, because no prison (or parole) term was imposed, in that the imposition of sentence was suspended. The Attorney General agrees, as do we.

The trial court pronounced Thrasher's sentence as follows: "Imposition of sentence is suspended. You are placed on a grant of felony formal probation for a period of four years. . . . And, as I indicated, if you do violate your probation, you could serve up to three years in state prison. [¶] . . . [¶] And if you do violate probation, you are sentenced to state prison, then you would be subject to a period of parole after your release from state prison . . . of up to three years." Because the court did not impose a prison term, his sentence did not include a period of parole.

In *People v. Tye* (2000) 83 Cal.App.4th 1398, this court pointed out that the parole revocation fine under section 1202.45 should be stricken if "probation [was] granted upon suspension of *imposition* of sentence, for in that situation the defendant has not been sentenced to a prison term." (*Id*. at p. 1401, italics in original.) We explained: "[O]n account of the suspension of execution of sentence the defendant was 'presently not subject to a parole period and will not be absent a revocation of her probation and

commitment to prison.'" (*Ibid,* italics omitted.) In the matter before us, the parole revocation fine must be stricken.

III. DISPOSITION

The judgment is modified by deleting the parole revocation fine under section 1202.45. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections.

STEVENS, J.

We concur.

JONES, P.J.

SIMONS, J.